Between Scylla and Charybdis: Growth Management Act Implementation That Avoids Takings and Substantive Due Process Limitations[1]

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The State of Washington recently joined the select group of states that have adopted statewide standards for land use planning.[2] Statewide land use planning arrived in Washington through two recently adopted laws: the Growth Management Act of 1990 and the Growth Strategies Act of 1991 (GMA).[3] These laws mark a significant change in land use regulation in the State of Washington. Formerly, local governments remained almost exclusively responsible for land use regula-

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1. "So her advice ran; but I faced her, saying:

> Only instruct me, goddess, if you will, how, if possible, can I pass Kharybdis, or fight off Skylla when she raids my crew?

Swiftly that loveliest goddess answered me:

> Must you have battle in your heart forever? The bloody toil of combat? Old contender, will you not yield to the immortal gods? That nightmare cannot die, being eternal evil itself— horror, and pain, and chaos; there is no fighting her, no power can fight her, all that avails if flight."

HOMER, THE ODYSSEY 225 (R. Fitzgerald trans., Doubleday 1961). In this passage Odysseus appeals to Circe for advice on navigating his craft between the twin perils of Charybdis, the whirlpool, and Scylla, the cave dwelling monster on the shore. J. FINLEY, JR., HOMER'S ODYSSEY 132 (Harvard University Press 1978).

2. The states of Oregon, Florida, Georgia, and Massachusetts have adopted laws that establish statewide statutory standards for land use planning. *See* OR. REV. STAT. ch. 197 (1991); FLA. STAT. ANN. §§ 163.3161—163.3215 (West 1990 & Supp. 1993); GA. CODE ANN. § 40-3546.1 (Harrison Supp. 1992); MASS. GEN. LAWS ch. 40, § 4I (West Supp. 1993).

3. Growth Management Act, 1990 Wash. Laws 1972, 1st Ex. Sess., ch. 17 (amended by Growth Strategies Act, 1991 Wash. Laws 2903, 1st Sp. Sess., ch. 32, and Open Space Corridors—Use and Management of Land Within Corridors, 1992 Wash. Laws 1050, ch. 227) (codified at WASH. REV. CODE ANN. ch. 36.70A (West 1991 & Supp. 1993), WASH. REV. CODE ANN. ch. 47.80 (West Supp. 1993), and WASH. REV. CODE ch. 82.02 (West 1991 & Supp. 1993)).

tion. The planning enabling laws for cities[4] and for counties[5] give skeletal guidance for land use planning. And, except for the requirement that comprehensive land use plans include land use and transportation elements,[6] these planning statutes are largely content and value neutral. They therefore provide scant direction to guide the locally adopted plans and regulations.[7]

Thus, perhaps the most profound change brought about by the GMA is its articulation of statewide planning goals and its prescription that land use planning accomplish certain minimum objectives.[8] Among these minimum objectives are requirements that certain critical areas (such as wetlands) be protected,[9] that agriculture, forest, and mineral resource lands be conserved,[10] that urban growth be directed to urban growth areas,[11] that public facilities be adequate to serve development at the time that development is available for occupancy,[12] and that local governments have the authority to impose development impact fees to fund certain designated facilities and services.[13]

When implemented by way of local plans and regulations, these basic objectives will affect the use of private lands in at least three ways. First, they will reduce the intensity of development in critical areas and resource lands. Second, they will potentially delay development in areas that lie beyond urban growth areas or that cannot be concurrently served with public facilities and services. Finally, development within urban areas will become more costly as municipalities are given the authority to impose a portion of the costs of furnishing public

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4. WASH. REV. CODE ANN. chs. 35.63, 35A.63 (West 1990 & Supp. 1993).

5. *Id.* ch. 36.70.

6. *Id.* § 36.70.330 (West 1991) (pertaining to counties); *id.* § 35A.63.061 (West 1990) (pertaining to municipal code cities).

7. For example, as to counties, the Revised Code of Washington provides that the land use element to the comprehensive plan shall designate "the proposed general distribution and general location and extent of the uses of land" and shall further provide "for protection of the quality and quantity of ground water used for public water supplies . . . ." *Id.* § 36.70.330(1) (West 1991).

8. The GMA sets forth thirteen planning goals to "be exclusively for the purpose of guiding the development of comprehensive plans and development regulations." *See id.* § 36.70A.020.

9. WASH. REV. CODE ANN. §§ 36.70A.030(5), .060, .170 (West 1991 & Supp. 1993).

10. *Id.*

11. *Id.* § 36.70A.110(1).

12. *Id.* § 36.70A.020(12) (West 1991).

13. *Id.* § 82.02.050(1)(b) (West Supp. 1993).

facilities and services on the landowner. The GMA thus marks a transformation in how future growth is to be planned for and where it is to go. This transformation, in turn, imposes additional burdens on landowners and affects what an individual landowner is able to do with her land.

This type of regulation in land use has been met with a backlash of legal challenges. In recent years, many of these challenges have been favorably received by the courts. A series of recent decisions by the United States Supreme Court and the Washington State Supreme Court indicate that land use restrictions will be much more closely scrutinized under both the Takings Clause and substantive due process doctrine.[14] The challenge presented to local governments is the implementation of effective growth management legislation that will survive this heightened scrutiny. The uncertain future implementation of growth management will largely be decided through administrative and judicial decisions and tested under takings and substantive due process case law.

Thus, in formulating growth management legislation to meet continually evolving standards, local planners and lawmakers find themselves confronting perils every bit as treacherous as those faced by Ulysses. On the one hand is the risk that courts may find highly protective legislation to "go too far" under takings jurisprudence or to be "unduly oppressive" under substantive due process. On the other hand, lawmakers could attempt to steer clear of judicial challenges by enacting weak legislation that does little to accomplish the objectives of growth management. Either course would frustrate the implementation of the GMA.

This Article takes the position that no reason exists for local legislation implementing the GMA to necessarily run afoul of these twin perils. But, to steer a safe course, local decision-makers must pay close attention to the standards imposed by recent court decisions. Specifically, they must closely tailor their plans and development regulations to the objectives of the GMA and to the impacts it seeks to alleviate; they should provide procedural protections that avoid harsh

14. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Robinson v. Seattle, 119 Wash. 2d 34, 830 P.2d 318, *cert. denied*, 113 S. Ct. 676 (1992); and Sintra, Inc. v. Seattle, 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, 113 S. Ct. 676 (1992). After this Article went to print, the Washington Supreme Court handed down two additional takings and due process cases. *See* Guimont v. Clarke, 121 Wash. 2d 586, 854 P.2d 1 (1993); Margola Assocs. v. Seattle, 121 Wash. 2d 625, 854 P.2d 23 (1993).

results; and they should enact their plans and regulations in a well-documented process. The purpose of this Article is to provide a background in takings and substantive due process law to enable local governments to accomplish this task.

An analysis of the extent to which legislation implementing GMA objectives will run afoul of the takings and substantive due process limitations carries its own inherent limitations. First, only interim designations and protections for critical areas and resource lands have been adopted to date.[15] For the twenty-six counties and one hundred eighty-one cities that are planning under the GMA, the original deadline for comprehensive plan adoption was July 1, 1993,[16] and the deadline for adoption of development regulations implementing comprehensive plans was July 1, 1994.[17] During the 1993 session, the legislature extended these deadlines by one year for the adoption of comprehensive plans and an additional six months, upon request, for the adoption of development regulation.[18] Consequently, for the most part, the legislation implementing the GMA has yet to be adopted.

The second limiting factor is that the holdings in takings cases turn principally on the facts of each case. To compound this limitation, case law in this area is in a state of flux. Consequently, the issue of whether future growth management legislation will exceed constitutional limits as defined by future courts involves a high degree of speculation.

This Article begins with an overview of the GMA. It then proceeds with a summary of recent case law under the Takings Clause and substantive due process doctrine. After laying this groundwork, this Article focuses on four particular areas of growth management control and explores how local legislation implementing these areas of control would be analyzed under the Takings Clause and substantive due process. These four areas of land use regulation include: critical area protections, resource land designations, development phasing requirements for concurrency and urban growth areas, and impact fees for public facilities and services. This Article then concludes with

15. The designations and protections for critical areas and resource lands are "interim" in the sense that these regulations are to remain in effect until development regulations covering all lands are adopted by July 1, 1994. WASH. REV. CODE ANN. §§ 36.70A.060(2), .120 (West 1991).

16. *Id.* § 36.70A.040(3).

17. *Id.* § 36.70A.120.

18. ESHB 1761, 1st Spec. Sess., 1993 Wash. Laws 2564, ch.6.

several brief observations as to measures that may be taken to protect growth management legislation from takings and substantive due process challenges.

I. THE GROWTH MANAGEMENT ACT

A. Background

The Washington State Legislature enacted the GMA in 1990 in response to the growth pains of the 1980s: traffic congestion, school overcrowding, urban sprawl, and loss of rural lands.[19] These conditions inspired evocative photographs of endless lines of cars and of subdivisions and shopping centers rolling up against rural lands. The GMA was also enacted in part to respond to a far more ambitious citizen's growth management initiative, Initiative 547.[20]

In enacting the GMA, the legislature borrowed heavily from growth management measures enacted in other states. For example, the urban growth areas concept largely came from the urban growth boundary requirement of Oregon's Comprehensive Land Use Planning Coordination Act of 1973,[21] and the transportation concurrency requirement came from Florida's Local Government Comprehensive Planning and Land Development Regulation Act of 1986.[22] In other respects, the GMA contains features that are unique to Washington. In keeping with the state's tradition of strong local control, the GMA allows for considerable local variation and prescribes a rather limited role for the state oversight agency, the Department of Community Development (DCD).[23] In contrast, the Oregon and Florida laws provide for a much stronger state

19. *See, e.g., Pierce Report, reprinted in* THE SEATTLE TIMES, Oct. 1-8, 1989. Admittedly, by 1993 the common perspective of growth has changed. In the wake of announced layoffs by a major industry in the northwest, The Boeing Company, in many sectors growth is seen as a virtue to be encouraged, rather than a force to be harnessed. Yet, the factors that gave rise to the conditions of the 1980s still exist, and if they remain uncorrected, will again produce unbridled growth.

20. *See* Jeffrey M. Eustis, *A Comparison of Statewide Land Use Planning Measures: Initiative 547, The Growth Management Act, and the Growth Stategies Commission Report*, MID-YEAR CONFERENCE OF THE LAND USE AND ENVIRONMENTAL LAW SECTION OF THE WASHINGTON STATE BAR ASSOCIATION (1990). As indicative of its greater strength, I-547 contained an initial statement of statewide planning goals, just as the GMA, but unlike the GMA, I-547's goals applied to siting and project specific decisions. *Id.* at 3-4.

21. OR. REV. STAT. ch. 197 (1991).

22. FLA. STAT. ANN. § 163.3177(9), (10) (1990).

23. For example, WASH. REV. CODE ANN. § 36.70A.190(4)(b) (West Supp. 1993), delegates to DCD rulemaking authority for "procedural criteria," but these criteria

role. Consequently, the GMA is often characterized as a "bottoms up" approach.[24]

B. An Overview of the Act

The GMA is lengthy and comprehensive.[25] It has also been amended in each of the legislative sessions following its enactment in 1990.[26] Because a full analysis of the GMA is beyond the scope of this Article, only its principal requirements will be summarized here. The changes brought about by the GMA can be summarized under the following nine points.

First, the GMA established thirteen statewide goals that are to be the core of regional and local planning.[27] These goals are to be "used exclusively for the purpose of guiding the development of comprehesive plans and development regulations."[28] Among these goals are requirements that urban growth be directed to established urban areas, that resource lands for timber and agriculture be protected, and that transportation and other public facilities and services be adequate to serve the needs of development.[29]

Second, the GMA mandates comprehensive planning for the state's most rapidly growing counties and for all cities lying within those counties.[30] Other counties and cities are permitted to opt in.[31] Although the GMA originally applied to twelve counties, a total of twenty-six of Washington's thirty-nine counties are now planning under the GMA. This includes the one hundred eighty-one cities lying within those counties.[32]

Third, the GMA requires that plans be implemented through regulatory controls and that those controls be consis-

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must reflect the "regional and local variations and the diversity that exists among different counties and cities that plan under [the Act]." *Id.*

24. *See* DEP'T OF COMMUNITY DEVELOPMENT, THE WASHINGTON STATE GROWTH MANAGEMENT PROGRAM, A BOTTOM UP PRIMER 1 (Oct. 1991).

25. The GMA was passed by the legislature under ESHB 2929, which totalled 82 pages.

26. *See* RESHB 1025, 1st Sp. Sess., 1991 Wash. Laws 2903, ch. 32; SB 6401, 1992 Wash. Laws 1050, ch. 227; ESHB 1761, 1st Spec. Sess., 1993 Wash. Laws 2564, ch. 6.

27. WASH. REV. CODE ANN. § 36.70A.020 (West 1991).

28. *Id.*

29. *Id.* § 36.70A.020(1), (8), (12).

30. *Id.* § 36.70A.040(1).

31. *Id.* § 36.70A.040(2).

32. Washington State Department of Community Development, Growth Management Program, Summary of Jurisdictions Planning Under the Growth Management Act (June 1992).

tent with the adopted plans.[33] Previously, plans served only as guides for zoning, lacking any legally enforceable standard of consistency.[34]

Fourth, the GMA integrates land use planning with planning for transportation and other public facilities, requiring that these facilities be concurrently available for development.[35] Specifically for transportation, each jurisdiction planning under the GMA must enact an ordinance prohibiting new development if concurrency standards cannot be met.[36]

Fifth, the GMA addresses urban sprawl by requiring that jurisdictions designate urban growth areas and direct future growth into those areas.[37] Urban growth areas are defined as areas either with urban growth or where urban growth is appropriate.[38] Outside of urban growth areas, growth may occur only if it is not urban in nature.[39]

Sixth, the GMA requires that certain areas be designated to receive special protections. These areas include natural resource lands (agricultural, forest, and mineral lands) and certain critical areas (wetlands, geologically hazardous areas, frequently flooded areas, aquifer recharge areas, and wildlife habitat).[40] These designations and protections must be adopted prior to the adoption of plans and development regulations and no later than March 1, 1992.[41]

Seventh, the GMA specifically authorizes the levying of impact fees for certain public facilities and services (roads, parks, schools, and fire protection) and for tenant assistance programs.[42] Previously, only "voluntary" development fees were allowed.[43]

Eighth, the GMA requires some degree of regional planning. All counties that plan are required to develop a set of

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33. WASH. REV. CODE ANN. § 36.70A.120 (West 1991).

34. *See, e.g., id.* § 35A.63.061 (West 1990) (comprehensive planning applicable to cities operating under the Optional Municipal Code); Lutz v. Longview, 83 Wash. 2d 566, 574, 520 P.2d 1374, 1379 (1974) (comprehensive plan is not a regulatory measure, but serves simply as a guide for such measures).

35. WASH. REV. CODE ANN. § 36.70A.020(12) (West 1991).

36. *Id.* § 36.70A.070(6)(e).

37. *Id.* § 36.70A.110.

38. *Id.* §§ 36.70A.030(14), (15), .110 (West 1991 & Supp. 1993).

39. *Id.* § 36.70A.110(1) (West Supp. 1993).

40. *Id.* § 36.70A.060(1).

41. *Id.* § 36.70A.060(2).

42. *Id.* § 82.02.050.

43. *Id.* § 82.02.020.

county-wide planning policies that provide a framework for the plans later adopted by the county and its constituent cities.[44] Additionally, the three most populous counties (King, Pierce, and Snohomish) are required to develop multi-county policies for the same purpose.[45] These county-wide plans are in addition to county-wide transportation planning required under the GMA.

Finally, the GMA, as amended in 1991, contains special siting provisions. Local plans are required to include a process for selecting sites for "essential public facilities," such as airports, schools, transportation facilities, correctional institutions, and solid-waste facilities.[46] Additionally, counties planning under the GMA may adopt special procedures for siting new, fully-contained communities and recreational resorts outside of urban growth areas.[47]

C. Administration and Enforcement

Implementation of the GMA rests largely on the shoulders of local government. The DCD plays more of an information and assistance role than a regulatory and enforcement role. Its rulemaking function is limited to creation of guidelines for classifying resource lands and critical areas[48] and to providing procedural criteria for plan adoption.[49] Even these rules leave a tremendous amount of discretion to the local level.[50] And as to substantive review of plans and development regulations, DCD and other state agencies are entitled to comment,[51] but do not certify plans as being in compliance with the GMA.

Enforcement of the GMA requirements will be carried out principally on an ad hoc basis through appeals concerning specific plans and regulations. The 1991 amendments to the GMA provide for enforcement through an administrative appeals board and a system of incentives and sanctions. Denominated

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44. *Id.* § 36.70A.210.

45. *Id.* § 36.70A.210(7).

46. *Id.* § 36.70A.200.

47. *Id.* § 36.70A.350 (new fully contained communities); *id.* § 36.70A.360 (master planned resorts).

48. *Id.* § 36.70A.050 (West 1991).

49. *Id.* § 36.70A.190(4)(b) (West Supp. 1993).

50. *See* WASH. ADMIN. CODE ch. 365-190 (Supp. 1991) (minimum guidelines for resource lands and critical areas), and § 365-195 (1992), Wash. St. Reg. §§ 92-18-097, 92-23-065 (effective Dec. 19, 1992) (procedural criteria for comprehensive plans and development regulations).

51. WASH. REV. CODE ANN. § 36.70A.106(1).

the Growth Planning Hearings Board (GPHB), the appeals board has jurisdiction over the following areas: (1) compliance of local plans and regulations with the GMA and the State Environmental Policy Act (SEPA); (2) county-wide policies; (3) the twenty-year population projections prepared by the state Office of Financial Management; and (4) the approval of new communities.[52] An appeal to the GPHB may be taken by the state, a city or county, or any person who appeared during deliberations or is certified by the governor as having standing.[53]

The GMA uses both carrots and sticks to ensure compliance. As an incentive to conduct the required planning, the GMA makes adoption of the required plans a prerequisite to qualification for loans or pledges for public works projects and water pollution control facilities.[54] For noncompliance, the GMA grants the governor authority to withhold certain funds from state agencies and local governments. These funds include allotments from the motor vehicle fuel tax, the sales and use tax, and the liquor profit and excise taxes.[55]

Having set forth a summary of the GMA's requirements, this Article will now review the constitutional limitations that confront local governments in the implementation of these requirements.

II. TAKINGS AND SUBSTANTIVE DUE PROCESS LAW IN WASHINGTON

What in theory are two distinct constitutional doctrines are in practice blurred together. The Washington State Supreme Court has characterized the challenge of treating these two separate constitutional doctrines as being "[l]ike handling flypaper";[56] the court has found it difficult to place one doctrine down while picking up the next. Consequently, recent case law has run takings and substantive due process

52. *Id.* § 36.70A.280(1) (jurisdiction over adoption of plans, regulations and population projections); *id.* § 36.70A.210(6) (jurisdiction over county-wide policies); *id.* § 36.70A.350 (approval of a new community is an amendment to the comprehensive plan and therefore reviewable by the GPHB).

53. *Id.* § 36.70A.280(2).

54. *Id.* § 70.146.070 (West 1992) (water pollution control facilities).

55. *Id.* § 36.70A.340(2) (West Supp. 1993).

56. Robinson v. Seattle, 119 Wash. 2d 34, 48, 830 P.2d 318, 327, *cert. denied*, 113 S. Ct. 676 (1992).

analyses together.[57] Therefore, in order to pass constitutional muster, legislation must survive both the takings and substantive due process tests. In recent cases, these tests have been administered through a veritable maze of questions. Before navigating this maze, however, it will be helpful to identify the similarities and differences between these two constitutional doctrines.

A. Comparison of Takings and Substantive Due Process Doctrines

At the core of both the takings and substantive due process doctrines is an act of balancing and a determination of fairness. The balancing weighs the character of the governmental action against the economic impact on the property owner.[58] The fairness determination requires a judgment by the court that "[o]ne landowner should not be forced to bear the economic burden to confer a benefit upon the public, the cost of which rightfully should be spread over the entire community."[59]

The fairness determination is based on an identical principle for both doctrines. In *Presbytery of Seattle v. King County*,[60] the court enunciated this standard of fairness in the context of its taking analysis. More recently, in *Robinson v. Seattle*,[61] the same test was articulated as the basis for the court's invalidation of Seattle's Housing Preservation Ordinance on substantive due process grounds.

The fairness determination, however, serves different purposes under each of these constitutional doctrines. Under takings analysis, regulation beyond the point at which the court determines that Fifth Amendment protections have been exceeded results in a taking.[62] The remedy, however, is not invalidation of the regulation, but compensation for the interest that has been taken. For takings purposes, the inquiry is whether the regulation in question is so restrictive that it con-

57. *See, e.g.*, *Robinson*, 119 Wash. 2d 34, 830 P.2d 398; Sintra, Inc. v. Seattle, 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, 113 S. Ct. 676 (1992); Presbytery of Seattle v. King County, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990).

58. *See Robinson*, 119 Wash. 2d at 51, 830 P.2d at 328.

59. *Presbytery*, 114 Wash. 2d at 329 n.13, 787 P.2d at 912 n.13.

60. 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990).

61. 119 Wash. 2d 34, 830 P.2d 318, *cert. denied*, 113 S. Ct. 676 (1992).

62. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

structively results in the exercise of eminent domain.[63] In contrast, the remedy for a substantive due process violation is invalidation of the enactment itself.[64] Thus, the inquiry for substantive due process purposes is whether "the police power . . . has exceeded its constitutional limits."[65]

B. The Analytical Framework Used in Washington

In *Presbytery*, the Washington State Supreme Court laid out an analytical framework for takings and substantive due process analysis. The *Presbytery* decision represented a second attempt in recent years to clarify what is acknowledged to be the "most perplexing area of American land use law."[66] This interjection of clarity was necessitated by an apparent discontinuity that resulted from the extensive elaboration on takings and due process standards in *Orion Corp. v. State*[67] and the same court's seeming departure from that analysis in *Allingham v. Seattle*.[68] The court's urgency to set the doctrinal record straight seems all the more apparent because its clarification was largely set forth in dicta. The carefully crafted analytical framework never received application in *Presbytery*

63. *Id.* at 419. Because this type of regulation occurs outside of a formal condemnation process, it has been characterized as an "inverse condemnation."

64. *Presbytery*, 114 Wash. 2d at 332 n.20, 787 P.2d at 913-14 n.20.

65. *Id.* at 330, 787 P.2d at 913.

66. Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339, 339 (1989).

67. 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988). In *Orion*, the landowner had proposed to fill in large portions of 11,000 acres of Padilla Bay, north of the Skagit River delta in Skagit County, but was not permitted to do so under the state Shoreline Management Act of 1971 and legislation creating the Padilla Bay Estuarine Sanctuary. Orion challenged these enactments as regulatory takings. In a very lengthy and elaborate opinion, the court attempted to make coherent state and federal law with regard to takings analysis. Ultimately, the court reversed the trial court's finding of a regulatory taking on summary judgment and remanded the matter for trial on the takings issue. *Id.* at 669-70, 747 P.2d at 1088.

68. 109 Wash. 2d 947, 749 P.2d 160 (1988), *overruled in part by* Presbytery of Seattle v. King County, 114 Wash. 2d 320, 787 P.2d 907 (1990). *See Presbytery*, 114 Wash. 2d at 323, 787 P.2d at 909; Settle, *supra* note 66, at 342. Within two months of *Orion*, the court passed down a decision in *Allingham*, which was notable in its outcome, its brevity, and its failure to even mention the carefully laid out analysis in *Orion*.

In *Allingham*, landowners had challenged a Seattle greenbelt ordinance, which essentially required that designated lands be left in a natural state. The ordinance contained a savings limitation that rendered no lot undevelopable. Ignoring its prior analysis in *Orion*, the court held that by preventing profitable use of 50 to 75 percent of a parcel of property, the ordinance effected a taking. *Allingham*, 109 Wash. 2d at 952-53, 749 P.2d at 163.

because the case itself was decided on exhaustion grounds.[69] Nonetheless, the analytical framework announced in *Presbytery* has received application in subsequent decisions.[70]

1. Threshold Inquiry

Under Washington law, the court begins its analysis of takings and due process claims with a threshold inquiry. This inquiry asks two questions. First, whether the challenged regulation protects the public interest in health, safety, the environment or the fiscal integrity of an area. Second, whether the regulation destroys or derogates any fundamental attribute of ownership: the rights to possess exclusively, to exclude others, and to dispose of property.[71] If the answer to this two-part inquiry is that the regulation does not destroy a fundamental attribute of ownership and does nothing more than protect the public health, safety, and welfare, then the regulation cannot amount to a taking and there exists no entitlement to compensation.[72] In that event, however, a challenged regulation may still be subject to a substantive due process challenge.[73] On the other hand, if a regulation fails the threshold inquiry it must then be reviewed for a taking.

2. Takings Analysis

Takings analysis is applied if the threshold inquiry does not remove the possibility of a taking. In this analysis, the first determination is "whether the regulation substantially advances legitimate state interests."[74] If it does not, then the

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69. In *Presbytery*, the property owner challenged the King County wetlands ordinance on grounds that the law prevented it from subdividing its property into more than two residential lots. The Presbyterian Church of Seattle challenged the ordinance as a regulatory taking without ever submitting an application for development of the property. *Presbytery*, 114 Wash. 2d at 324, 787 P.2d at 909-10. The court, however, characterized the action as an "applied" challenge. *Id.* at 337, 787 P.2d at 916. Without a factual determination as to the uses to which the property could ultimately be put, the court concluded that the challenge to the wetlands ordinance was not ripe for review under either the Takings Clause or substantive due process. *Id.*

70. *Robinson*, 119 Wash. 2d at 49-55, 830 P.2d at 327-30; *Sintra*, 119 Wash. 2d at 12-24, 829 P.2d at 771-77.

71. *Presbytery*, 114 Wash. 2d at 329-30, 787 P.2d at 912; *Robinson*, 119 Wash. 2d at 49-50, 830 P.2d at 328.

72. *Presbytery*, 114 Wash. 2d at 330, 787 P.2d at 912; *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328.

73. *Presbytery*, 114 Wash. 2d at 330, 787 P.2d at 912-13; *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328.

74. *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328.

regulation is a per se taking. If the regulation is found to advance legitimate state interests, the regulation is next reviewed for either a "facial" challenge or an "as applied" challenge.[75] A facial challenge exists where the application of the challenged regulation is claimed to result in a taking of any parcel of regulated property. An "as applied" challenge exists where a regulation is challenged as it applies to a specific parcel of property.[76]

In a facial challenge, if a landowner is able to show that the challenged regulation "denies all economically viable use of any parcel of regulated property," a taking will be found.[77] In an "as applied" challenge, the court determines whether a taking has occurred based on consideration of the following three factors: "(1) the economic impact of the regulation on the property, (2) the extent of the regulation's interference with investment-backed expectations, and (3) the character of the government action."[78] If, at the end of this analysis, the court determines that a taking has occurred, then just compensation is required by the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 16 of the Washington State Constitution.[79]

3. Substantive Due Process Analysis

Whether or not a regulation passes the threshold test for a taking, it must still be reviewed to determine whether the exercise of the police power has exceeded constitutional lim-

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75. *Presbytery*, 114 Wash. 2d at 333, 787 P.2d at 914; *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328.

76. *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328.

77. *Presbytery*, 114 Wash. 2d at 333-34, 787 P.2d at 914; *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328.

78. *Presbytery*, 114 Wash. 2d at 335-36, 787 P.2d at 915; *Robinson*, 119 Wash. 2d at 51, 830 P.2d at 328.

79. *Presbytery*, 114 Wash. 2d at 336, 787 P.2d at 916. The Fifth Amendment to the U.S. Constitution reads in pertinent part as follows: "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V. This requirement has long been imposed on state governments and their political subdivisions through the Fourteenth Amendment. Chicago, Burlington and Quincy Railroad v. Chicago, 166 U.S. 226 (1897).

The Washington State Constitution reads in pertinent part as follows: "No private property shall be taken or damaged for public or private use without just compensation having first been made or paid into the court for the owner. . . ." WASH. CONST. art. 1, § 16. The Washington State Supreme Court has construed the state constitutional provision to be identical to that of the federal Constitution. *Presbytery*, 114 Wash. 2d at 332 n.20, 787 P.2d at 913-14 n.20 (quoting Orion Corp. v. State, 109 Wash. 2d 621, 649, 747 P.2d 1062, 1077 (1987), *cert. denied*, 486 U.S. 1022 (1988)).

its.[80] Here the court applies a three pronged due process test: (1) whether the regulation aims to achieve a legitimate public purpose, (2) whether the means adopted are reasonably necessary to achieve that purpose, and (3) whether the regulation is unduly oppressive on the property owner.[81]

In administering this test, the court scrutinizes the challenged action for any "unduly oppressive" effect. To guide this inquiry, the court has listed no shortage of considerations:

> The "unduly oppressive" inquiry lodges wide discretion in the court and implies a balancing of the public's interest against those of the regulated landowner. We have suggested several factors for the court to consider to assist it in determining whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner.[82]

If, after consideration of these factors, a regulation fails to pass the substantive due process analysis, then it is subject to invalidation.[83] Additionally, through the federal Civil Rights Act,[84] substantive due process violations may form the basis for an action in damages.[85]

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80. *Presbytery*, 114 Wash. 2d at 330, 787 P.2d at 913; *Robinson*, 119 Wash. 2d at 51, 830 P.2d at 329.

81. *Presbytery*, 114 Wash. 2d at 330, 787 P.2d at 913; *Robinson*, 119 Wash. 2d at 51, 830 P.2d at 328-29.

82. *Robinson*, 119 Wash. 2d at 51-52, 830 P.2d at 329 (quoting *Presbytery*, 114 Wash. 2d at 331, 787 P.2d at 913). For further refinement, these three factors—nature of harm, less drastic alternatives, and economic loss—are recast into nine differently worded "non-exclusive factors" for applying the unduly oppressive balancing test:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Presbytery, 114 Wash. 2d at 331, 787 P.2d at 913 (citing William Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 WASH. U.J. URB. & CONTEMP. L. 3, 33 (1983)).

83. *Presbytery*, 114 Wash. 2d at 331-32, 787 P.2d at 913; *Robinson*, 119 Wash. 2d at 52, 830 P.2d at 329.

84. 42 U.S.C. § 1983 (1988).

85. *Robinson*, 119 Wash. 2d at 52, 830 P.2d at 329; *Sintra*, 119 Wash. 2d at 23, 829 P.2d at 777.

C. The Analytical Framework as Applied in Recent Cases

This analytical framework has been recently applied in the *Robinson v. Seattle*[86] and *Sintra, Inc. v. Seattle*[87] decisions, which arose out of challenges to Seattle's Housing Preservation Ordinance (HPO). This ordinance provided that before a change of use or demolition of existing housing units could occur, a developer would be required to: (1) pay a fee to be used for the construction or rehabilitation of low-income housing; (2) provide for 120-day notice of intended demolition; and (3) pay up to $1000 per family in relocation assistance.[88] The ordinance was subsequently amended to allow applicants for demolition permits to construct replacement housing in lieu of fee payment, and to provide for a reasonable use exception that waived the replacement housing requirement if compliance would deprive a landowner of all economically viable use of the property.[89] The original HPO was invalidated by the King County Superior Court as an improper tax.[90] When the HPO was amended in an attempt to cure its defects, the revised ordinance was also struck down as an unauthorized tax.[91] This decision was upheld on appeal in *San Telmo Associates v. Seattle*.[92] Until this decision, the City had continued to enforce the housing replacement requirement of the HPO against all developers except San Telmo.

1. *Robinson v. Seattle*

In *Robinson*, the named plaintiffs brought a class action on behalf of all persons who had paid housing replacement fees and tenant relocation assistance during the period that the HPO had been enforced. Plaintiffs alleged that the continued enforcement of the HPO constituted a taking and a violation of substantive due process. On these grounds, the plaintiffs also sought recovery of damages under 42 U.S.C. § 1983.[93] The trial court dismissed the damage claims under Section 1983, but granted recovery of past payments under the HPO.[94]

86. 119 Wash. 2d 34, 830 P.2d 318, *cert. denied*, 113 S. Ct. 676 (1992).
87. 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, 113 S. Ct. 676 (1992).
88. *Robinson*, 119 Wash. 2d at 42, 830 P.2d at 324.
89. *Id.* at 43, 830 P.2d at 324-25.
90. *Id.* at 43, 830 P.2d at 324.
91. *Id.* at 44, 830 P.2d at 325.
92. 108 Wash. 2d 20, 735 P.2d 673 (1987).
93. The Civil Rights Act, 42 U.S.C. § 1983 (1988).
94. *Robinson*, 119 Wash. 2d at 45-46, 830 P.2d at 326.

On appeal, the Washington State Supreme Court found that the HPO failed the threshold test under the taking analysis. The court held that the ordinance went beyond the prevention of harm by imposing on private landowners the burden of providing replacement housing that, in the opinion of the court, "was one best borne by the community rather than by individuals. . . ."[95] But, as the court went through its taking analysis, it concluded that the HPO did serve legitimate state interests and did not deny all economically viable use of any regulated property. Accordingly, no facial taking was found. And, because the challenge did not relate to any particular parcel of property, the court did not engage in an "as applied" analysis. Therefore, the court found no regulatory taking.[96]

On substantive due process grounds, the court concluded that the HPO was unduly oppressive. In so concluding, the court principally relied on *San Telmo Associates v. Seattle*,[97] in which it reasoned that the need for providing additional low-income housing was a burden to be shared by the city at large, rather than one imposed on individual property owners. Having found a substantive due process violation, the court proceeded to hold that this violation would give rise to liability and damages under 42 U.S.C. § 1983.

2. *Sintra, Inc. v. Seattle*

Sintra involved a property owner who had sought to convert a residential hotel to a mini-storage building. For property that the owner had purchased for $670,000, the City had required payment of $219,840 under the HPO as a condition for issuance of a demolition permit. The City insisted on payment of the fee from the time that it was imposed in 1985 until 1987, when the *San Telmo* decision was rendered. However, by the time that the demolition fee had been lifted, the developer had claimed that the proposed use was no longer economically viable. The developer sued the City for damages under 42 U.S.C. § 1983 for a violation of substantive due process and an unconstitutional taking for claims of inverse condemnation and wrongful interference with business expectancy.[98]

The court characterized Sintra's claims as an "as applied"

95. *Id.* at 53, 830 P.2d at 330.
96. *Id.*
97. 108 Wash. 2d 20, 25, 735 P.2d 673, 675 (1987).
98. *Sintra*, 119 Wash. 2d at 6-10, 829 P.2d at 768-70.

takings challenge. Applying the three factors, the court found the character of the governmental action to be indicative of a taking, but found the record insufficient to make the necessary factual determinations regarding the economic impact of the regulation and its interference with investment-backed expectations. Accordingly, the court remanded the case for proof that no viable use of the property remained.[99]

On substantive due process grounds, the *Sintra* court found the HPO to be unduly oppressive. The court relied on the *San Telmo* reasoning and cited the tremendous economic impact that the HPO placed on the developer (a fee equal to approximately one-third the value of the property) and the City of Seattle's continuing enforcement of an ordinance that the court considered to be a "deliberate flouting" of its prior orders.[100] On the claim for damages under 42 U.S.C. § 1983, the matter was remanded for trial.

In both *Robinson* and *Sintra*, the substantive due process requirements receive far more rigorous application than in other non-land use cases. In areas of economic legislation, the court has previously repudiated the notion that regulations could be struck down as "unduly oppressive."[101] Thus, the court leaves unanswered several questions. Is its heightened substantive due process review only applicable to the regulation of property rights? If so, what is the basis for that limitation? Do there exist due process guarantees and other protections for property rights under the Fourteenth Amendment in addition to those provided under the Fifth Amendment and substantive due process standards that are not otherwise applicable to non-land use economic legislation? Or, are *Robinson* and *Sintra* applicable to all areas of legislation? These and other questions will no doubt be posed in subsequent cases.

D. Takings Analysis After Lucas v. South Carolina Coastal Commission

The unique feature of Washington takings jurisprudence following *Orion* and *Presbytery* was the creation of a category of regulations that would be insulated from takings challenges.

99. *Id.* at 17-18, 829 P.2d at 774.

100. *Id.* at 21-24, 829 P.2d at 776-78.

101. Salstrom's Vehicles v. Department of Motor Vehicles, 87 Wash. 2d 686, 693, 555 P.2d 1361, 1366 (1976).

This is the category of regulations that pass the threshold inquiry and are found to safeguard the public health, safety and welfare, and do not involve infringement on a fundamental attribute of ownership. The United States Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*[102] puts Washington's categorical insulation of certain police power measures in question.

1. *Lucas* Creates a New Categorical Takings Rule

Lucas involved a dispute over the use of two waterfront lots on a South Carolina barrier island. David Lucas purchased the lots for $975,000 in 1986, intending to construct single family homes. At the time, such development was permissible, and, indeed, the adjacent properties supported single family homes. However, in "roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide."[103]

In 1988, the South Carolina State Legislature passed the Beachfront Management Act, which prevented Lucas from building any permanent habitable structures on his land. Without ever applying for any permits, seeking any variances, or attempting to market or develop his property for any other use, Lucas challenged this act on grounds that the construction limitation constituted a taking under the Fifth and Fourteenth Amendments of the Constitution. The state trial court agreed and found that the Act rendered his property valueless and entered an award in excess of $1.2 million. The South Carolina Supreme Court reversed the trial court judgment and held that regardless of this economic impact on the property, the Beachfront Management Act was designed to prevent serious public harm and therefore could not constitute a taking.[104]

In a 5-1-3 decision, the United States Supreme Court held that South Carolina's Beachfront Management Act resulted in a temporary taking of Lucas's property, and it remanded the case to the South Carolina Supreme Court for a determination as to whether a permanent taking had occurred based on the principles set forth in its decision.[105]

Lucas is significant for a number of reasons. First, the

102. 112 S. Ct. 2886 (1992).
103. *Id.* at 2905 (Blackmun, J., dissenting).
104. *Id.* at 2887.
105. *Id.* at 2888.

Court created a new categorical taking for regulations that deny all economically viable use of land. Second, *Lucas* narrowed the prevention of harm exception to apply only to common law nuisances. Third, the Court hinted that in future takings cases deprivation of all viable use may be based on only the affected portion of property, rather than the parcel as a whole. Fourth, the Court indicated a willingness to relax strict exhaustion requirements. And fifth, the Court demonstrated its increased reluctance to grant deference to legislative findings. This case provides a significant boost to the interests of property rights advocates in that each of these changes offer greater protection to landowners. These changes are elaborated on below.

To begin with, the most apparent effect of *Lucas* is to create another category of *per se* takings. Previously, a category of *per se* takings existed for actions that resulted in a physical invasion of private property or interference with fundamental attributes of property, such as the right to possess, to exclude others, or to dispose of property.[106] Typical of these cases are *Loretto v. Teleprompter Manhattan CATV Corp.*,[107] where the Court invalidated a city ordinance compelling apartment owners to allow installation of a transmittal box by cable TV companies, and *Kaiser Aetna v. United States*,[108] where the Court concluded that a requirement to open a privately created lagoon to public navigation constituted a taking. For other types of regulations the Supreme Court has used a "multi-factor balancing test" to resolve takings disputes.[109] The Court has refused to develop any "set formula" for this test; its outcome is largely dependent on "the particular circumstances in [each] case."[110] Thus, *Lucas* created a second, discrete category of regulatory action that may be compensable without a case-

106. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 n.18 (1987).

107. 458 U.S. 419 (1992).

108. 444 U.S. 164 (1979).

109. *See Loretto*, 458 U.S. at 444.

110. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). This test balances the public interest promoted by the regulation against the economic impacts on affected properties. *Id.* at 124-25. In considering the public interest, the court looks to the nature of the regulation, its effectiveness, and the necessity of harm to property owners. *Id.* at 127-29. In considering economic impact, the court examines diminution of value, remaining value, and interference with investment-backed expectations. *Id.* at 127-36. The balancing test does not establish a threshold of economic impact at which a taking will result.

specific inquiry.[111]

Second, *Lucas* narrowed an exception to this categorical taking for cases in which the denial of all economically viable use is based on "background principles of nuisance and property law."[112] This exception applies when "the proscribed use interests were not part of [the owner's] title to begin with."[113] Thus, *Lucas* substantially narrowed an exception to takings challenges that previously applied to all regulations whose purpose could be characterized as nuisance prevention.[114]

Third, the Court indicated that it may be willing to divide the parcel of property into discrete parts to determine whether there has been a total deprivation of all economically viable use. Historically, the Court has insisted that the economic impact of a regulation be measured against the parcel as a whole.[115] *Lucas*, however, casts doubt on this proposition. In footnote 7, the Court questioned whether it will continue to view the parcel as a whole:

> When for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the

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111. *Lucas*, 112 S. Ct. at 2893.

112. *Id.* at 2901-02.

113. *Id.* at 2899.

114. The nuisance prevention exception had its origin in the 1887 decision of *Mugler v. Kansas*, 123 U.S. 623 (1933), in which the Court upheld state legislation prohibiting the manufacture of alcoholic beverages. The site owner had challenged the statute on grounds that it removed all practical use of his facilities. The Court acknowledged this impact, *id.* at 657, but went on to conclude that no taking could result from legislation that was necessary to protect the public health, safety and welfare:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense, be deemed a taking or an appropriation of property for the public benefit.

Id. at 668-69.

The *Mugler* holding has been subsequently followed in a long line of cases for the proposition that harm prevention legislation cannot constitute a taking. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915), and more recently in First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987); Keystone Coal Association v. DeBenedictis, 480 U.S. 470 (1987). The prevention of harm exception has also been followed by the Washington State Supreme Court in *Orion*, 109 Wash. 2d at 654, 749 P.2d at 1080, and *Presbytery*, 114 Wash. 2d at 329 n.13, 787 P.2d at 912 n.13.

In *Lucas*, the purpose of the remand was for the South Carolina Court to consider whether the denial of Lucas's proposal could be supported based on the state's background principles of nuisance law. *Lucas*, 112 S. Ct. at 2901-02.

115. *Keystone*, 480 U.S. at 497; Andrus v. Allard, 444 U.S. 51, 65-66 (1979); *Penn Central*, 438 U.S. at 130-31.

> owner has been deprived of all economically beneficial use on the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[116]

Whether this uncertainty was caused by the factual basis of available precedent, or by disagreement within the Court, the Court does not appear eager to resolve this issue.[117]

Fourth, *Lucas* relaxed the exhaustion requirement. In prior cases, the court required takings claimants to fully exhaust all procedural avenues for relief, including variance procedures.[118] *Lucas* was a facial takings challenge; there had been no applications for permits or variances. Pointing to the lack of application, four dissenting Justices felt that Lucas had not shown that his property had been left "valueless."[119]

This relaxation of the exhaustion requirement creates a number of uncertainties as to the circumstances that will result in the deprivation of all economically viable use. For the purposes of its opinion, the Court accepted at face value the trial court's finding that the Beachfront Management Act rendered the Lucas property "valueless." Although the State never challenged this finding, it was not supported by the record. As the dissenting Justices pointed out, there had never been a determination of the value of the parcel for non-residential purposes, such as its value to adjoining property owners

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116. *Lucas*, 112 S. Ct. at 2894 n.7. How the Court would analyze the situation carries importance for Washington takings jurisprudence. In *Allingham v. Seattle*, 109 Wash. 2d 947, 749 P.2d 160 (1988), the court struck down a greenbelt preservation ordinance based on its effect on a *regulated* portion of land. In *Allingham*, the entirety of the affected parcels remained developable. On the proposition that the assessment of economic impact could be based only on one portion of the regulated parcel of property, the holding in *Allingham* was expressly overruled in *Presbytery*. *Presbytery*, 114 Wash. 2d at 335, 787 P.2d at 915. In the event that the Supreme Court were to abandon its view of the parcel as a whole, new life may be breathed back into *Allingham*.

117. In *Tull v. Virginia*, 113 S. Ct. 191 (1992), the Court recently denied certiorari in a takings challenge to a wetlands ordinance. As applied to the claimant, the ordinance prevented the filling of a three acre portion of a 12-acre parcel. The landowner claimed a total taking of the regulated portion. *See* Appendix A to Petition for a Writ of Certiorari, Course No. 92-112. Thus, the case presented squarely the issue of whether the takings analysis should be focused solely on the regulated area. One may infer from the Court's denial of certiorari that there exist sufficient votes on the Court to place in question the parcel as the whole approach, but insufficient votes to change the law.

118. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 190-94 (1985) (holding that absent final determination as to how regulation will be applied to particular land in question there is no jurisdiction).

119. *Lucas*, 112 S. Ct. at 2908 (Blackmun, J., dissenting).

for recreational purposes or for beach access.[120] The majority was willing to ignore this void in the record. Two explanations emerge. First, the Court simply ignored the discontinuity in the record in order to reach the holding that it otherwise would have reached had the record been fully developed. Second, a denial of the landowner's preferred use for residential housing may amount to a denial of all economically viable use for purposes of the categorical takings test. If the Court's newly created categorical taking can be triggered by a denial of a preferred use without an actual showing of a denial of all use, then it may apply very broadly.

Fifth, the *Lucas* decision represents the Court's increased willingness to look behind legislative findings. Traditionally, courts have reviewed legislative determinations in areas not involving fundamental rights or protected classifications under the rational basis test.[121] This test requires a high degree of deference to legislative fact finding. Even where facts are not offered in specific support of legislation, the Court has been willing to uphold legislation as long as it could conceive of some set of facts that would sustain the legislation.[122] *Lucas* shifts the standard of review for takings cases to the other end of the spectrum. Even where legislation is supported by findings, the Court indicated an unwillingness to accept such findings at face value. The Court goes even further and suggests that the inability to make proper legislative findings may simply be the result of having a "stupid staff."[123] Due to this skepticism, the Court appears far more willing to accept judicial findings on background principles of common law nuisance that may be decades old, than it is to accept contemporary legislative findings. Similarly, the *Lucas* Court was far more willing to accept the unsubstantiated finding that the Lucas property had become "valueless," than the evidence of past erosion and flooding that the State of South Carolina had advanced in support of its Beachfront Management Act.

2. The Effect of *Lucas* on Takings Law in Washington

At the very least, *Lucas* rearranges the order of the tests

120. *Id.*

121. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976); Ferguson v. Skrupa, 372 U.S. 726 (1963).

122. *Id.*

123. *Lucas*, 112 S. Ct. at 2898 n.12.

under the Washington takings doctrine. First, under *Presbytery*, the denial of all economically viable use test applies only after the court determines that the regulation is subject to takings analysis under the threshold test. *Lucas* elevates this test to a separate threshold category of takings. Second, under *Presbytery*, regulations intended to prevent harm are absolutely insulated. After *Lucas*, if a regulation denies all economically viable use, it is insulated only if the harm that is to be prevented is rooted in common law principles of nuisance in property.

This rearrangement of tests received its first application in the Washington State Court of Appeals decision of *Powers v. Skagit County*.[124] *Powers* involved an application for a building permit on a lot lying within the twenty-five year floodplain. The lot lay in a subdivision that had been approved by Skagit County in 1977. However, ten years later, the county adopted a new floodplain management ordinance that prohibited new residential construction within designated floodways. Based on these regulations, the requested building permit was denied and the property owner sued the county claiming that his property had been taken without just compensation.[125] The court applied the *Lucas* holding as a " 'pre-threshold' step on the *Presbytery* framework[,]" [126] which the court described as follows:

> At the outset, the plaintiff must have the opportunity to demonstrate that the regulations at issue strip his property of *all* economically viable use. The State at this point will have the opportunity to rebut this claim with evidence that some economically viable use exists for the plaintiff's property. The State may further seek to show that plaintiff's use is proscribed by "existing rules and understandings" of this

124. 67 Wash. App. 180, 835 P.2d 230 (1992). Subsequent to this article going to print, the Washington Supreme Court in *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P. 2d 1 (1993) specifically addressed the impact of *Lucas* upon the *Presbytery* takings analysis. In squaring *Presbytery* with *Lucas*, the court concluded that "both 'physical invasions' and 'total takings', as those terms are used in *Lucas*, are most appropriately analyzed under the second prong of the *Presbytery* threshold inquiry, in which the court examines whether a regulation infringes on a fundamental attribute of ownership." *Id.* at 598, 854 P.2d at 8. Thus, rather than considering the deprivation of all use to be a separate categorical taking, the Washington court treats it as a type of infringement upon a fundamental attribute of ownership. Apart from this minor clarification, the analysis in *Powers* remains unaffected by the holding in *Guimont*. *Id.* at 599, 854 P.2d at 8 (holding in *Powers* cited with approval).

125. *Powers*, 67 Wash. App. at 182-83, 835 P.2d at 231.

126. *Id.* at 190, 835 P.2d at 236.

> State's property and nuisance law . . . . If the State prevails on either (or both) grounds, the plaintiff will not be entitled to categorical takings treatment under *Lucas* and the court will proceed to analyze the case under the *Presbytery* framework. However, if the court finds categorical treatment under *Lucas* appropriate, then plaintiff will be entitled to compensation for a taking without "case-specific inquiry into the public interest advanced in support of the restraint."[127]

Powers was decided on motions for summary judgment.[128] The court found that the record was not sufficiently developed for it to make any determination as to a denial of economically viable use.[129] Accordingly, the case was remanded to determine whether it was entitled to categorical takings treatment under *Lucas*.[130] Additionally, Powers claimed denial of substantive due process rights.[131] The trial court dismissed this claim on summary judgment. The court of appeals reversed and remanded for further proceedings as to the alleged "undue oppressiveness" of the floodway regulation.[132]

III. THE POTENTIAL FOR TAKINGS CHALLENGES UNDER THE GMA

Having reviewed the recent takings and substantive due process cases, this Article now addresses the effect of these cases on potential growth management legislation. This analysis focuses on four categories of legislation where takings challenges are likely to occur: (1) critical areas protections, (2) resource land protections, (3) growth phasing regulations through concurrency requirements and the designation of urban growth areas, and (4) the imposition of impact fees. These are not the only areas in which a takings or substantive due process challenge could arise. These areas are the focus of this Article because they are among the core requirements of the GMA, they are among the earliest to be addressed, and they are among the most likely to attract takings and substantive due process challenges. Potential takings and due process

127. *Id.* (quoting *Lucas*, 112 S. Ct. at 2893) (citations omitted; emphasis in original).
128. *Id.* at 181, 835 P.2d at 231.
129. *Id.* at 194-95, 835 P.2d at 238.
130. *Id.* at 195, 835 P.2d at 238.
131. *Id.* at 195, 835 P.2d at 238-39.
132. *Id.* at 194-95, 835 P.2d at 238.

challenges in each of these four areas are analyzed through the following hypothetical situations.

A. Critical Areas Designations

All counties and cities in the State of Washington are required to adopt development regulations that protect "critical areas" as defined by the GMA.[133] Those critical areas include the following areas and ecosystems: "(a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas."[134]

Among these five categories, wetlands regulations may be the most likely target for takings and due process challenges, because wetlands that are not adjacent to or associated with the shorelines of the state have not previously been regulated at the state level.[135] Additionally, wetlands regulations largely preclude any use of the regulated parcel. Finally, when considered with required buffered areas, wetlands protections can restrict the development of substantial areas of land.[136]

A constitutional challenge to a wetlands ordinance could arise under facts similar to the following hypothetical. Landowners have five acres in a valley. Their house, garage, driveway and horse barn sit on one acre. The remainder has been used as a horse pasture. However, after their children leave home, landowners sell their horses and have no further use for the pasture. Other properties in the area have been subdivided into one-half acre lots as permitted by applicable zoning. Now the owners seek to do the same, and apply to the county for a ten lot subdivision.

Under the local jurisdiction's GMA-inspired critical areas ordinance, the subdivision application requires an initial criti-

133. WASH. REV. CODE ANN. § 36.70A.060(2) (West Supp. 1993).

134. *Id.* § 36.70A.030(5) (West 1991).

135. The shorelines of this state are regulated by the Shoreline Management Act of 1971. *Id.* ch. 90.58 (West 1992). The shorelines of the state include all "associated wetlands." *Id.* § 90.58.030(2)(d). The term "wetlands" is defined to mean lands extending 200 feet from ordinary high water mark, floodways, floodplains within 200 feet of floodways, and marshes, bogs, swamps and river deltas associated with shorelines of the state. *Id.* § 90.58.030(2)(f). Isolated, or non-connected wetlands have not been regulated under the Shoreline Management Act.

136. *See, e.g.*, DEPARTMENT OF ECOLOGY MODEL WETLANDS PROTECTION ORDINANCE § 7.1.a (1990) (wetland buffer zone for Category I wetland ranges from 200 to 300 feet).

cal areas review, which reveals that three acres lie in a wetland. Additionally, an acre of buffer area must be provided to protect the wetland. Under a local provision for a transfer of density from the wetland area to the upland area, the owners are able to create two lots in addition to the parcel on which their house sits, rather than the planned nine. At a net return of $50,000 per lot, they determine that two additional lots would provide them with a return of $100,000, rather than $450,000 from the sale of nine. They view this economic impact to be "unduly oppressive" and bring a challenge to the wetlands ordinance as applied to their property.

Whether this challenge succeeds as a taking under the "pre-threshold" *Lucas* test depends on whether the owner's property is viewed in its entirety or the wetland portion is treated separately. If viewed in its entirety, an approximate eighty percent diminution in value will not constitute a taking under *Lucas*.[137] If the regulation survives the categorical taking rule of *Lucas*, it would also survive Washington takings tests. A similar wetlands ordinance was found to be insulated from a takings challenge in *Presbytery*.

Even if a court applied the *Lucas* categorical rule to the regulated portion of the property, there is a strong basis for concluding that no taking would occur. In this instance, in order to survive the *Lucas* categorical test, it would be necessary for the county to demonstrate that prohibition of development was based on "background principles of nuisance and property law."[138] There exist at least two grounds upon which such a showing could be made.

First, *Orion* recognized that there may exist certain natural limits to the legal uses of land.[139] In Washington, lands underlying navigable waters, including tidelands, may not be filled or obstructed if this would interfere with the rights of navigation and recreation.[140] This "public trust doctrine" effectively limits the lawful use of land underlying such areas, and

137. *Lucas*, 112 S. Ct. at 2895 n.8 ("It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full."). Similar deprivations of value have been held not to result in takings. *See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (80% reduction); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (74% reduction); Mugler v. Kansas, 123 U.S. 623 (1887) (total loss).

138. *Lucas*, 112 S. Ct. at 2901-02.

139. *Orion*, 109 Wash. 2d at 659, 747 P.2d at 1082.

140. Wilbour v. Gallagher, 77 Wash. 2d 306, 316-17, 462 P.2d 232, 238 (1969), *cert. denied*, 400 U.S. 878 (1970).

it may either totally preclude a taking claim or substantially reduce the damages arising from such a claim.[141] *Orion* also recognized that the public trust doctrine protects not only navigational rights, but also includes protections for wildlife, isolated shorelands, and nonwater-based land that may have special importance for the health, welfare, and safety of the public.[142] Thus, the public trust doctrine may supply the background principles of nuisance and property law that could sustain a regulation which denies all economically viable use within wetlands.

Second, a regulation that denies development within wetlands may be sustainable on grounds that the owners never had a right to use the land as it was never suited for development in its natural state. To support this proposition, *Orion* cited to two cases in which the use of land had been similarly limited. First, in *Just v. Marinette County*,[143] the Wisconsin Supreme Court held the following: "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[144] The court concluded that it was not unreasonable to limit the use of property to its natural state.[145] Second, in *New Hampshire Wetlands Board v. Marshall*,[146] the New Hampshire Supreme Court upheld the denial of building permits to fill a wetland. Applying a notice theory, the court reasoned that where the owners waited to develop their property in the face of growing public concern over wetlands, there could be no legitimate claim that their investment-backed expectations had been frustrated.[147]

Therefore, if the *Lucas* "denial of all economically viable use" test were applied in a wetland regulation challenge, background principles of common law nuisance could satisfy the exception to the total deprivation rule. Consequently, the owners in our hypothetical may be left without a cause of action for a taking.

Initially, it may appear that a substantive due process chal-

141. *Orion*, 109 Wash. 2d at 641, 747 P.2d at 1073.
142. *Id.* at 641 n.10, 747 P.2d at 1073 n.10.
143. 201 N.W.2d 761 (Wis. 1972).
144. *Id.* at 768.
145. *Id.*
146. 500 A.2d 685 (N.H. 1985).
147. *Id.* at 690.

lenge to the wetlands ordinance would fare better. Such a challenge would enable the owners to go directly to the claimed oppressiveness of the ordinance,[148] without having to expend considerable sums of money in the plat approval process to exhaust administrative remedies. However, a key factor distinguishes this case from the assessment of housing replacement fees as in *Robinson*. In *Robinson*, the court based its holding on the policy that the problem of homelessness was to be shared city wide, and not to be visited on the individuals who happened to own low-income housing.[149] Nothing makes one parcel inherently more suitable for low-income housing than another, and nothing about a particular use of property creates a need for low-income housing over other uses. But in the case of wetlands, there is a basis for requiring wetland protections to be borne by individual properties.[150] The location of wetlands is largely the function of natural attributes of the property itself, such as topography, subsurface geology, soils make-up, and the ground and surface water regime.

Thus, the economic impact of wetlands ordinances on wetland owners is not likely to serve as a basis for invalidation under substantive due process. Wetlands cases require a property specific resolution because wetlands are property specific. For these reasons, the wetlands ordinance will likely pass the substantive due process balancing test.

B. Resource Lands

As to natural resource lands, the declared goal of the

148. Under substantive due process analysis, the court inquires as to whether the challenged regulation seeks to achieve a legitimate public purpose, whether its means are reasonably necessary, and whether it is unduly oppressive. *Presbytery*, 114 Wash. 2d at 330-31, 787 P.2d at 913. As the court was willing to conclude in *Presbytery*, wetlands protections legislation serves a legitimate purpose and uses means reasonably suited to accomplish that purpose. *Id.* at 337, 787 P.2d at 916. On the issue of unduly oppressive impact, the *Presbytery* court found that the plaintiffs had failed to exhaust their administrative remedies. *Id.* at 337, 787 P.2d at 916. In view of the *Presbytery* opinion, any due process challenge to wetlands regulations is apt to principally focus on economic impact.

149. *Robinson*, 119 Wash. 2d at 53, 830 P.2d at 330.

150. The *Robinson* court specifically distinguished its holding from how it would treat environmental regulation of resources such as wetlands and shorelines:

> We would distinguish our threshold determination in this case, however, from that which may result when the development of a particular piece of property would cause direct harm to the environment, such as the destruction of an irreplaceable wetland or shoreline ecosystem.

Id.

GMA is to "encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses."[151] All counties and cities that plan under the GMA must adopt development regulations to ensure the conservation of agricultural, forest, and mineral resource lands.[152] The declared goal of discouraging incompatible uses guides these regulations. As illustrated below, the GMA creates potential constitutional issues by mandating the regulation of resource lands.

A hypothetical taking and due process case arises in a rural county that previously had no zoning and only vague comprehensive plan policies. In this county, residential development outside of incorporated cities is governed only by the Washington Subdivision Act.[153] If a subdivision applicant can satisfy minimum requirements, such as adequate provisions for access, septic sewer, storm drainage, and water supplies, approval is granted.[154] Additionally, conversion of forested lands to residential use requires approval by the county under the Forest Practices Act.[155] In practice, however, lacking any policy basis to deny residential use in forested areas, the county routinely approves forest land conversions.

Under these standards, county landowners developed a widespread practice of acquiring forest land, harvesting the timber, and converting the cleared site to residential development through short platting. The county's short platting ordinance allows the creation of a subdivision of up to nine lots without the dedication of roads, the creation of a water supply, or the testing of soils for on-site septic treatment.

An individual purchases a fifty-acre wooded parcel with the intention to subdivide. The parcel is purchased at a price in excess of the going rate for forest land, but one that would make residential development highly profitable. Shortly after site acquisition, but prior to any Forest Practice or subdivision applications, the County enacts growth management policies intended to protect forest lands. The County, in turn, implements these policies through development regulations that establish a forty-acre minimum lot size and preclude any residential use. After the passage of these regulations, the forest

151. WASH. REV. CODE ANN. § 36.70A.020(8) (West 1991).
152. *Id.* § 36.70A.060(1).
153. *Id.* ch. 58.17 (West 1990).
154. *Id.* § 58.17.110 (West Supp. 1993).
155. *Id.* § 76.09.050(7).

landowner submits a Forest Practices Act application and requests permission from the County to convert to residential uses. The owner contemporaneously files a short plat application. The County denies both requests. The owner claims that she cannot economically use the property for timber management and, therefore, no economically viable use of the land remains. The owner then initiates claims for taking and substantive due process violations.

A facial takings challenge would likely fail. Resource land zoning for forestry and agriculture advances legitimate state interests because it protects those lands from the encroachment of incompatible uses. Additionally, resource land protections do not result in the denial of all economically viable use if they allow continued designated uses. Therefore, the forest land owner's taking claim would most likely take the form of an as applied challenge.[156]

The relevant economic impact of the forest land regulation is not the regulation's effect on the land's value for forest practices, but the effect on the forest landowner's expectations to convert to a more profitable use. Because the land retains value for forestry, the economic impact of the regulation alone would not likely result in a taking. Rather, the forest landowner's challenge is likely to be based on the alleged interference with investment-backed expectations.

Unlike the owners of the wetland property, the forest landowner has concrete evidence of an investment-backed expectation, including prior conversion practices in the county and her purchase of the property for a value that reflected that practice. However, these expectations are probably not sufficient to establish a taking because they were predicated on the County's prior failure to enforce forest land conversion limita-

156. In an as applied takings challenge, the court considers: "(1) the economic impact of the regulation on the property; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action." *Presbytery*, 114 Wash. 2d at 335-36, 787 P.2d at 915. The economic impact test for purposes of an as applied challenge concerns whether the property owner has been left with "a reasonable fair market value" in light of legally permissible uses and potential sales to non-governmental agencies. *Orion*, 109 Wash. 2d at 665, 747 P.2d at 1085. "Investment-backed expectations" must have some "concrete manifestation" and must be "appropriate under the circumstances." *Presbytery*, 114 Wash. 2d at 336 n.29, 787 P.2d at 915 n.29 (citing Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3 (1987)). The character of the governmental action focuses on whether the challenged regulation results in a physical invasion of the property. *Id.* at 336 n.30, 787 P.2d at 915-16 n.30.

tions. Additionally, prior to the passage of forest land protections, the forest landowner had not "vested" her development rights under the pre-existing laws by filing complete plat applications prior to the passage of the forest land protections.[157]

On substantive due process grounds, *Robinson* and *Sintra* are not likely to provide much help to the forest landowner. As with wetlands regulations, a court would likely find that resource lands protections serve a legitimate public purpose and use reasonably necessary means to accomplish those purposes. And, for the same reasons that forest land protections would not create an undue economic impact for takings purposes, they would not likely be unduly oppressive for due process purposes.

Zoning controls on agricultural lands with impacts similar to the forest land protections at issue here have been upheld against takings and due process challenges in other jurisdictions. In *Virginia Beachfront v. Virginia Land Investment Association No. 1*,[158] the court, against takings challenges, upheld the downzoning of a planned development residential housing category to an agricultural classification because economically viable uses remained. Similarly, in *Barancik v. Marin*,[159] the court upheld agricultural zoning against a substantive due process challenge. The agricultural zoning required a minimum lot size of sixty acres. A landowner sought to convert a ranch into a twenty-eight unit subdivision, asserting that the ranch was no longer economically viable because its tax liability exceeded its ability to generate income.[160] The County denied the plat and rezone application and the landowner challenged the zoning limitation as arbitrary. The court found that it was within the County's discretion to set aside the lands for rural uses:

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157. WASH. REV. CODE ANN. § 58.17.033(1) (West 1990) (a subdivision application shall be considered under the laws in effect on the date that a fully completed application is submitted). This is the statutory application of Washington's common law vested rights doctrine to subdivisions. The vested rights doctrine permits developers to "fix" the rules that will govern their land development. West Main Assoc. v. Bellevue, 106 Wash. 2d 47, 51, 720 P.2d 782, 785 (1986). Under this rule, "developers who file a timely and complete building permit application obtain a vested right to have their applications processed according to the zoning and building ordinances in effect at the time of the application." *Id.* at 50-51, 720 P.2d at 785. Under the vested rights doctrine, the court has given judicial recognition of investment-backed expectations. *Presbytery*, 114 Wash. 2d at 336 n.29, 787 P.2d at 915 n.29.

158. 389 S.E.2d 312, 314 (Va. 1990).

159. 872 F.2d 834, 837 (9th Cir.), *cert. denied*, 493 U.S. 894 (1989).

160. *Id.* at 835.

> Marin's zoning no doubt preserves a bucolic atmosphere for the benefit of a portion of the population at the expense of those who would flow into the county if there was no zoning. The Constitution lets that decision be made by the legislature. The Countywide Plan is a legislative declaration that there will be a corridor in Marin agricultural in its use. The choice was not irrational, the application to Barancik not arbitrary.[161]

C. Concurrency and Urban Growth Areas

The GMA, through its concurrency mandate, requires that public facilities and services adequately serve the population and that development not expand too far ahead of the infrastructure necessary to serve that development. The urban growth area designation ensures that urban growth first occurs in those areas where public facilities and services can be adequately provided. These twin concepts are expressed in the GMA through its declared goals to "encourage development in urban areas where adequate public facilities exist or can be provided in an efficient manner" and to "[i]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."[162]

To carry out these goals, the GMA does the following: (1) prohibits development that would cause transportation to fall below adopted levels of service;[163] (2) prohibits developments that would degrade groundwater quality;[164] (3) requires capital facility planning adequate to serve the land uses permitted under the comprehensive plan;[165] and (4) requires proof of available water supplies before the issuance of building permits.[166]

In a hypothetical county, a landowner purchases inexpensive land on the outskirts of a small, unincorporated town. Zoned R-1, the property could be developed in single family lots at a density of one dwelling unit per acre. Under the

161. *Id.* at 837.
162. WASH. REV. CODE ANN. § 36.70A.020(1), (12) (West 1991).
163. *Id.* § 36.70A.070(6).
164. *Id.* § 36.70A.070(1).
165. *Id.* § 36.70A.070(3).
166. *Id.* § 19.27.097(1) (West 1990).

GMA, the landowner's property was not included within the area that the county designated as an urban growth area for the town. In order to maintain adequate levels of service within designated urban areas, the county retracted earlier plans to expand roads, water, and sewer to the landowner's area. As part of a second ten-year plan, these facilities were to be extended to the landowner's property.

The landowner asserted that the zoning must govern, and submitted a subdivision application anyway. Although the application conformed with the zoning, the county denied approval because key intersections in the area already fell below designated levels of service during commuter traffic rush hours, the site was unacceptable for on-site septic sewage treatment, and sewer lines would not be extended to the area for another ten years. Without these improvements the county would allow only residential development of at least ten acre lot size, agricultural uses, and forestry. Claiming to be denied an economic return on his property for ten years, the landowner sued.

From a takings standpoint, restrictions relating to concurrency differ from those relating to critical areas and resource lands because they segregate property in a temporal, rather than a geographic sense. Because the landowner may continue to make the same use of the property as at the time of purchase, a categorical taking under *Lucas* is not likely to arise. Additionally, because regulations regarding the timing of development are imposed to ensure adequate levels of service for the residents of the property, the "unduly oppressiveness" test for substantive due process violations is also not likely to be met.

In other jurisdictions, phasing controls that are far more onerous have been upheld against takings and due process challenges. In the watershed case of *Golden v. Planning Board of Ramapo*,[167] the town adopted phased capital facility plans covering a time period of eighteen years. To prevent premature subdivision and urban sprawl, the town awarded development permits under a point system based on the availability of essential facilities and services. The purpose of the permit system was to ensure orderly growth and adequate facilities.[168] The court found that the legislative scheme fell well within

167. 285 N.E.2d 291 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972).
168. *Id.* at 296.

the ambit of permissible zoning legislation and rejected takings and due process claims.

More recently, in *Long Beachfront Equities, Inc. v. Ventura*,[169] the court upheld a scheme similar to Washington's urban growth areas. The adopted county guidelines required that growth first occur in existing, incorporated cities. A property owner sought to develop an unincorporated area for housing and a shopping center. The County ultimately denied the proposal and downzoned the property to open space. The court found the County's decision to focus development first in incorporated areas to be a reasonable one and declined to second guess the county.[170]

While Washington courts have not specifically addressed growth phasing mechanisms, earlier zoning decisions indicate that such land use controls would be favorably received. In a case that involved what may be seen as an early precursor to urban growth boundaries, the Washington State Supreme Court in *Shelton v. Bellevue*[171] upheld the City's authority to draw a bright line between a low intensity residential district and a higher intensity commercial district based on comprehensive planning. Similarly, in a decision that anticipates principles of concurrency, the court in *SAVE v. Bothell*,[172] upheld the invalidation of a shopping center rezone that would result in the premature conversion of agricultural lands to commercial uses and inadequate transportation and drainage services. These cases provide some indication that restraints on urban sprawl would be upheld.

D. Impact Fees

To ensure both concurrency and consistency between capital facility and land use plans, cities and counties that plan under the GMA are given the power to impose impact fees for five categories of public facilities:[173] streets and roads, open spaces, parks and recreation facilities, schools, and fire protection.[174] Besides limiting impact fees to five categories of facili-

169. 282 Cal. Rptr. 877 (Cal. Ct. App. 1991), *cert. denied*, 112 S. Ct. 3027 (1992).

170. *Id.* at 885.

171. 73 Wash. 2d 28, 40, 435 P.2d 949, 955 (1968).

172. 89 Wash. 2d 862, 872, 576 P.2d 401, 406-07 (1978).

173. WASH. REV. CODE ANN. § 82.02.050 (West Supp. 1993).

174. *Id.* § 82.02.090(7). This authorization stands as an express exception to the general rule barring the imposition of any tax, fee or charge upon the development of land. *Id.* § 82.02.020.

ties, the GMA also limits the extent to which fees may be imposed: impact fees may only be imposed for improvements that are reasonably related to the new development; fees may not exceed a development's proportionate share of the costs of the new improvements; and the new improvements must actually benefit the proposed development.[175] Finally, any financing system for facilities improvements must balance impact fees and other sources of public funding.[176]

Even with these limitations, impact fees can range from insignificant to substantial. In King County, the typical road impact fee is approximately $1,050 on a $200,000 house, or approximately one-half percent.[177] The King County Commission on Impact Fees reported that impact fees vary nationally from $439 to $12,693 per single family home.[178]

In a hypothetical case, a developer buys an abandoned farm in a rapidly growing county. The county has included the farm within its urban growth area and has planned to upgrade two lane roads to five lanes and to build a fire station. The site is located within an existing equestrian community and the county plans to establish a park and trail system throughout the area. To meet the expanding population, the school district plans to construct three elementary schools, two middle schools, and a high school. As authorized by the GMA, the county has adopted an impact fee ordinance that establishes fees on all development for roads and on all residential development for schools and parks, including equestrian trails.

The developer seeks to create a townhouse development targeted principally to older adults. The developer believes that she will derive no benefit from the impact fees for the equestrian trails, parks, and schools. The farm was purchased for $670,000. Given the size of the development, the developer has calculated her impact fee for all planned facilities to be $219,840. Total construction costs for the development are approximately $8 million. The developer balks at the impact fee and claims that it renders her project uneconomic. She pays the fee under protest and sues to recover it on taking and substantive due process grounds.

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175. *Id.* § 82.02.050(3).

176. *Id.* § 82.02.050(2).

177. KING COUNTY COMMISSION ON IMPACT FEES, IMPACT FEES: RECOMMENDATIONS FOR THE REGION'S POLICY MAKERS 23 (June 1992).

178. *Id.*

To determine whether the impact fee ordinance resulted in a taking as applied to this property, a court would consider the economic impact of the regulation, its interference with investment-backed expectations, and the character of the governmental action.[179] In *Sintra*, an impact fee of similar magnitude was found to be a taking because no statutory authority existed for the fee; thus, the fee was determined to be an illegal tax on development.[180] The court did not determine whether the magnitude of the tax alone sufficiently impacted the property to constitute a taking.[181] Thus, the basis for finding a taking in *Sintra* would not exist here because impact fees for schools and parks are specifically authorized by statute.[182]

Following the three-pronged substantive due process test (legitimate state interest, reasonable means, and not unduly oppressive), the court is likely to find that the impact fees serve a legitimate public purpose in view of their use. The impact fees for schools and trails would fund public facilities. The legitimacy of the public purpose in imposing impact fees was accepted by the courts in *Sintra* and *Robinson*.

Also, a court is likely to find that financing public improvements through impact fees, rather than through local improvement districts or school district levies, is reasonable. The means test is satisfied because the fees are for improvements related to the development, the fees do not exceed the development's proportionate share of the costs of new facilities, and the new improvements actually benefit the development.

But, as in *Robinson* and *Sintra*, the developer's strongest challenge may be that the impact fees are unduly oppressive. As noted above, a determination of this unduly oppressive prong involves a weighing of factors on the public's side as well

179. *Presbytery*, 114 Wash. 2d at 335-36, 787 P.2d at 915.

180. *Sintra*, 119 Wash. 2d at 18, 829 P.2d at 774.

181. *Id.* at 17, 829 P.2d at 774.

182. WASH. REV. CODE ANN. § 82.02.050 (West Supp. 1993). An additional basis for a takings claim may lie under the holding in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), on grounds that there would not exist the required nexus between the impact of adult-oriented townhouses and the need for schools. However, the *Sintra* court construed *Nollan* to require the nexus test to be satisfied for development conditions involving only a physical invasion of property. *Sintra*, 119 Wash. 2d at 16 n.7, 829 P.2d at 772 n.7. At least as applied by Washington courts, the nexus requirement would not be applicable to impact fees. A challenge on nexus grounds may serve to invalidate school impact fees on statutory grounds, given that impact fees must be for improvements that are both related to and benefit the development. WASH. REV. CODE ANN. § 82.02.050(3) (West Supp. 1993).

as on the property owner's side. On the public's side, consideration may be given to the following factors: (1) the seriousness of the problem, (2) the contribution to the problem by the owner's land, (3) the extent to which the proposed regulation solves it, and (4) the feasibility of less drastic alternatives.[183] On the landowner's side, the court may consider several factors: (1) the loss of value, (2) the extent of remaining uses, (3) whether the regulation is temporary or permanent, (4) the extent to which the regulation should have been anticipated, and (5) the feasibility of altering intended uses.[184]

When reviewed under these factors, the use and magnitude of impact fees to fund roads, schools, parks, and a fire station would arguably not be unduly oppressive. First, on the public's side, facilities such as roads, schools, fire protection and parks are necessary to the orderly development of a community. Second, the development of any land within a new area contributes incrementally to the need for new facilities. While a townhouse for adults may not increase the school age population, it contributes to the need for schools by drawing new employees to the area, who in turn will seek housing within the vicinity. A reasonableness standard is provided for by the statute through the requirement that impact fees may not exceed a development's proportionate share of the costs of new improvements.[185] Third, a jurisdiction that bases its impact fees ordinances on capital facilities and land use plans is likely to demonstrate that the ordinance actually solves the problem. Fourth, an impact fee ordinance that also relies on a balance of public funds, as required by the GMA,[186] demonstrates that the fees it has chosen are not unduly oppressive.

On the landowner's side, the loss of value may be disproportionate compared to the purchase price. However, retaining the property as a farm would result in no fee. Accordingly, the total investment of $8 million is a better comparison for value. This results in a fee of approximately two and one-half percent of total development cost, which is well within the current range of impact fees.[187]

The remaining factors on the landowner's side are not likely to trigger a finding of undue oppressiveness in this hypo-

183. *Presbytery*, 114 Wash. 2d at 331, 787 P.2d at 913.

184. *Id.*

185. WASH. REV. CODE ANN. § 82.02.050(3) (West Supp. 1993).

186. *Id.* § 82.02.050(2).

187. *Compare* KING COUNTY COMMISSION ON IMPACT FEES, *supra* note 177, at 23.

thetical. Although the impact fees are permanent, lesser fees would be incurred through lower intensity development. Further, the exaction of development fees could have been anticipated from notice of the proposed legislation.[188]

However, simply providing a plausible response to each of these factors may not guarantee that legislation passes muster. By far the greatest variable in determining whether a regulation survives a substantive due process challenge is how closely the regulation is to be scrutinized by the court—an issue that lies in a state of flux. The scrutiny exercised in *Robinson* and *Sintra* departs from the deference that the court has traditionally shown legislative enactments. In its review of substantive due process claims, the court recently declared that "[t]he 'unduly oppressive' inquiry lodges *wide discretion* in the court."[189] This departs from prior case law, in which the court indicated its reluctance to second-guess policy judgments by legislative bodies.[190]

Robinson and *Sintra* also indicate that the ultimate decision may not turn solely on the court's enunciated factors. In *Robinson*, the court reviewed the substantive due process factors only in passing. The court analyzed these factors as follows:

> We review these nonexclusive factors in balancing the City's interests against the Robinsons'. The public problem of homelessness is certainly serious. The extent to which an owner's land or property particularly contributes to a public problem may in certain instances be determinative, such as in some environmental protection cases. However this factor is not particularly crucial in this action because these urban properties already have multiple potential uses. The problems of homelessness and a lack of low-income housing in Seattle are in part a function of how all Seattle landowners are using their property. We further conclude that both the feasibility of less harsh means of achieving the City's purpose and the permanence of the nonzoning regulation in

188. WASH. REV. CODE ANN. § 36.70A.020(11) (West 1991). A principal goal of the GMA is effective public participation.

189. *Presbytery*, 114 Wash. 2d at 331, 787 P.2d at 913 (emphasis added).

190. *See, e.g.*, Duckworth v. Bonney Lake, 91 Wash. 2d 19, 26-27, 586 P.2d 860, 865-66 (1978) (If legislation tends to promote public health, safety, morals or welfare, "the wisdom, necessity and policy of the law are matters left exclusively to the legislative body."); Salstrom's Vehicles v. Department of Motor Vehicles, 87 Wash. 2d 686, 693, 555 P.2d 1361, 1366 (1976) ("That a statute is unduly oppressive is not a ground to overturn it under the due process clause.").

> controlling the type of use of the landowner's property militate against the City.[191]

Under the court's analysis, these factors would support a finding of constitutionality. But the holding of the court rested on other reasoning:

> This court has already said of the HPO that solving the problem of the decrease in affordable rental housing in the City of Seattle is a burden to be shouldered commonly and not imposed on individual property owners. We hold the HPO to be an unduly oppressive, and thus unreasonable, regulation. It therefore violated the rights of the Robinsons to substantive due process under our holding in *Presbytery*. . . .[192]

The earlier language in *San Telmo*, which the court relied on in *Robinson*, is as follows:

> [T]he City may not constitutionally pass on the social costs of the development of the downtown Seattle area to current owners of low-income housing. The problem must be shared by the entire city, and those who plan to develop their property from low-income housing to other uses cannot be penalized by being required to provide more housing.[193]

And in *Presbytery*, the court offered a similar rationale for why a regulation that sought to enhance a publicly owned right in property, as opposed to safeguarding the public health, safety and welfare, might result in a taking under the threshold inquiry: "[O]ne landowner should not be forced to bear the economic burden to confer a benefit on the public, the cost of which rightfully should be spread over the entire community."[194] But no where in these cases does the court cite to authority for this proposition.[195] Thus, prior case law provides

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191. *Robinson*, 119 Wash. 2d at 55, 830 P.2d at 331.

192. *Id.* (citations omitted).

193. *San Telmo*, 108 Wash. 2d at 25, 735 P.2d at 675.

194. *Presbytery*, 114 Wash. 2d at 329 n.13, 787 P.2d at 912 n.13.

195. Language to similar effect appears in Armstrong v. United States, 364 U.S. 40 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Id. at 49. Yet this decision involves a constitutional taking and not a substantive due process challenge. The case arose from a challenge to a regulation that totally removed the value of personal property (a materialman's lien). Moreover, neither the fact situation nor the dicta have been relied upon by the Washington court.

no guidance for determining when economic burdens must be borne by the public at large. Nor does the court's bare pronouncement of this proposition provide any standards for making this judgment.

Consequently, under either substantive due process or takings analysis, if a case by case approach is used to determine when a burden is more fairly shared by the public at large, it becomes very difficult to accurately predict whether GMA implementing legislation will be found to be unduly oppressive for due process purposes or to enhance a publicly owned right for takings purposes. Following *Robinson*, it is equally conceivable that a court could strike down an impact fee ordinance for facilities, such as schools and equestrian trails, that would be less directly impacted by a townhouse on the grounds that those facilities should be funded by the public at large through general tax measures, rather than be borne in any substantial part by new development.

IV. CONCLUSION

Washington substantive due process cases and *Lucas* send a clear message that courts will be increasingly reluctant to obediently accept legislative findings. The Washington court is willing to exercise "wide discretion" to separately balance the legislature's allocation of burdens and benefits. The *Lucas* Court takes its doubts even further. In holding that the prevention of harm exception in takings cases must be rooted in the common law of property and nuisance, the Court shows a preference for judicial holdings, which may be decades or centuries old, in place of contemporaneous legislative findings. Neither court is willing to indulge legislative bodies in the traditional presumptions that policy judgments are to be left exclusively to the legislative body and that facts will be presumed to exist to support those policy judgments.[196]

This more exacting standard of review should be anticipated in the drafting of GMA legislation. Stronger factual records, rather than boilerplate findings, can demonstrate that the legislative bodies have made a reasoned choice among available alternatives, and that the balance is a fair one. In order to build an adequate factual record, and to avoid facial or categorical takings claims, procedural remedies for reasonable

196. Duckworth v. Bonney Lake, 91 Wash. 2d 19, 586 P.2d 860 (1978).

use exceptions and variances should be provided. To a large degree, careful drafting and attention to adequate procedural remedies should avoid having growth management legislation frustrated by takings and substantive due process challenges.